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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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No. 177.

JAMES COFFEY,
Plaintiff in Error,

v.

THE COUNTY OF HARLAN,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

C. C. FLANSBURG AND R. O. WILLIAMS,
Attorneys for Plaintiff

WEBSTER S. MORLAN AND WILTSE A. MYERS,
Attorneys for Defendant.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is an action of ejectment, brought to the circuit court of the United States within and for the district of Nebraska, in which James Coffey as plaintiff seeks to recover from the

county of Harlan in the state of Nebraska certain real estate held and claimed by said county of Harlan under a sheriff's deed, which deed and the proceedings and judgment upon which it rests are asserted to be void by Coffey, by reason of the fact that the judgment was rendered without any notice, and it was therefore without due process of law. A jury was waived and the cause tried by and submitted to the court, and special findings of fact were entered by it, reciting in detail the circumstances upon which each party relied to maintain his title; and as these facts are controlling in the final disposition of this cause, we reproduce here the court's findings as a part of the statement of the case. The court found:

"1. That one Ezra S. Whitney was the duly elected, qualified, and acting treasurer of Harlan county, Nebraska, from January 5, 1894, to January 9, 1896; and that at and prior to the time of his election to and incumbency in said office he was the owner in fee of the east half (E. ½) of the southeast quarter (S.E. ¼) of section one (1) and lots two (2) and three (3) of section twelve (12), all in township one (1) north of range seventeen (17) west, Harlan county, Nebraska."

"2. That on December 15, 1896, a criminal information in due form was filed in the district court of Harlan county, Nebraska, as follows:

"THE STATE OF NEBRASKA

v.

"EZRA S. WHITNEY.

"INFORMATION.

"Be it remembered that Gomer Thomas, county attorney in and for Harlan county, and in the 10th judicial district of the state of Nebraska, comes here in person into court at this December term, A.D. 1896, thereof, and for the state of Nebraska gives the court to understand and be informed that Ezra S. Whitney was the county treasurer

of Harlan county, Nebraska, from the 5th day of January, 1894, to the 9th day of January, 1896, and as such officer was charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money of Harlan county, Nebraska; that the said Ezra S. Whitney on the 8th day of January, 1896, in said county and state then and there being, and then and there as such officer being charged with the collection, receipt, safe-keeping, transfer, and disbursement of the public money of Harlan county, did then and there unlawfully and feloniously convert to his own use and embezzle a large sum of said money, to-wit: Eleven thousand one hundred ninety dollars, belonging to Harlan county, which said money had then and there come into the possession and custody of the said Ezra S. Whitney by virtue of said office and the discharge of the duties thereof.

"GOMER THOMAS, county attorney."

"3. That on the 13th day of May, 1897, upon a trial had upon said criminal information, the jury returned a verdict as follows:

"'We, the jury duly impaneled and sworn in the above entitled cause, do find the defendant guilty as charged in the information, and we further find the sum so embezzled to be $11,190.'

"4. That the court passed a sentence upon the said Ezra S. Whitney in the words and figures following:

"'It is therefore considered and adjudged by the court that Ezra S. Whitney, the defendant, be imprisoned in the penitentiary of the state of Nebraska, and be kept at hard labor, Sundays and holidays excepted, for the period of two years and six months, and that he also pay a fine in the sum of $22,380, and that he pay the costs of this case taxed at $205.08; solitary confinement is not a part of this sentence. The defendant given forty days to prepare and serve bill of exceptions. Defendant excepts.

'JOHN R. THOMPSON, judge.'"

"5. That said cause was appealed to the supreme court of Nebraska by said Whitney, and said conviction was affirmed, the record of said affirmance appearing in vol. 53, p. 287, of the Nebraska Reports."

"6. That on April 12, 1898, an execution issued on said criminal judgment, which was duly levied on the above described land, and the same was sold to Harlan county, which sale was confirmed on the 28th of November, 1898, and a sheriff's deed issued to Harlan county on the 13th of February, 1899."

"7. That on the 29th of November, 1899, the said Ezra S. Whitney transferred the said premises above described by quit-claim deed to William O. Woolman and John Everson, his attorneys; that said William O. Woolman and wife quit-claimed said premises to John Everson, and John Everson conveyed the said premises to the plaintiff herein."

"8. That on September 18, 1901, the said John Everson went upon said land and cut thirty-five forest trees; that he was arrested on a criminal complaint in writing, charging him with wilfully and maliciously cutting down the said trees, the property of Harlan county; that he was tried, convicted, and a fine imposed in the county court, from which the said Everson took an appeal to the district court; that he was found guilty therein and a fine imposed upon him; and that he appealed said cause from the district court to the supreme court, wherein said conviction and fine against said Everson were affirmed, a report of which is found in vol. 66 of the Nebraska Reports, p. 154. And that the said transfer of the said premises by said Everson to said Coffey was made subsequent to said final decision in the supreme court."

"9. That on September 15, 1896, a civil action was brought in the district court of Harlan county, Nebraska, in which the county of Harlan was plaintiff and Ezra S. Whitney and the sureties on his official bond as county treasurer were defendants, which sought to recover the amount of money due from said Ezra S. Whitney as

county treasurer, and said action was, on the 6th day of May, 1899, dismissed by the county of Harlan without prejudice."

The section of the statute under which Whitney was convicted and fined is found in the Nebraska criminal code and is (so far as necessary for our consideration) as follows:

"Sec. 124 (EMBEZZLEMENT OF PUBLIC MONEY). If any officer or other person charged with the collection, receipt, safe-keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county or precinct, organized city or village or school district in this state, shall convert to his own use, or to the use of any other person or persons, body corporate, association, or party whatever, in any way whatever, or shall use by way of investment in any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association, or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe-keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, loaned, or paid out as aforesaid, which is hereby declared to be a high crime, and *such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds, property, bonds, or securities, assets, or effects of any kind*

as aforesaid has been so embezzled. And in all cases such fine, so operating as a judgment, shall only be released or entered as satisfied by the party in interest as aforesaid," etc.

Comp. Stat. Neb. 1903, p. 1942.

In order to fully understand the conditions as they existed at the commencement of this action in the circuit court, let us briefly consider the two decisions of the Nebraska supreme court, cited by the circuit court in its findings and opinion and relied on by it as controlling.

Upon Whitney's conviction and sentence he appealed to the Nebraska supreme court and challenged the correctness of that judgment of conviction on the ground of insufficiency of the information under the statute, insufficiency of the evidence to convict, and errors of procedure occurring during the trial. The judgment of *conviction* alone was assailed by Whitney in that proceeding. The *statute itself* was in no manner challenged by him. The court was not called on to construe the act nor declare the meaning of its terms. And the opinion does not in any wise deal with the meaning, terms, or effect to be given the statute. The judgment of conviction was affirmed.

Whitney v. State, 53 Neb. 287.

The other case referred to in the circuit court's opinion arose as follows: Everson, the grantee of Whitney, went into possession of the premises and cut thirty-five trees and was arrested at the instance of the county for trespass, and was tried, found guilty, and by successive appeals brought the case to the Nebraska supreme court, claiming that so much of the statute (sec. 124) as awarded the "fine" to the person whose money had been embezzled was in violation of

the Nebraska constitution of 1875, and that the deed to the county based upon the "fine," and execution sale thereunder, was therefore void. The section of the constitution referred to is sec. 5, art. 8, and is as follows:

"Sec. 5. ALL FINES, PENALTIES, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. *All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue.*"

Comp. Stat. Neb. 1903, p. 67.

Sec. 124, *supra*, was passed in 1866, and under a constitution which permitted a fine to be imposed for the *use* of an *individual*. But Everson contended that the constitution of 1875 (above quoted) repealed so much of that section of the criminal code (124) as awarded a "fine" to the use of *individuals* injured. It was also contended by him that the school district in the county seat where the embezzlement occurred was the real and proper beneficiary, if the fine could be awarded under the statute to any one. The court, however, held otherwise. The Nebraska supreme court held that the amount *awarded in the criminal proceeding* (in which Whitney was adjudged guilty of embezzlement) was not a "fine" within the meaning of sec. 5, art. 8, of the constitution, but that the same was a *judgment*, *"allowed as compensation to the injured party"*; and that the legislature had

"authority *in a criminal action to authorize a judgment* which shall operate *in favor of the party whose money or effects*

have been embezzled, as *compensation for the value* of the thing embezzled, and *liquidated damages for the injury.*"

Everson v. State, 66 Neb. 154.

And again the opinion says (p. 158):

"It is further insisted that the statute is unconstitutional as inflicting double punishment upon Whitney, in that, in addition to the sentence of imprisonment, this fine was imposed. We can not give our assent to this reasoning, and do not care to put ourselves upon record as holding that the *return of the property*, or the *value* of the property which the thief has embezzled or stolen, either voluntarily or by compulsory process, should be considered *any part of his punishment.*"

After that construction was given to the statute by the Nebraska supreme court, Coffey purchased the land in controversy from Everson, and instituted this action of ejectment to recover possession, claiming that inasmuch as the Nebraska supreme court had held that the award of the $22,380 was simply a judgment for the value of the property taken, and liquidated damages, and was *no part of the punishment*, such judgment was rendered without due process of law and the proceedings under it are void. The circuit court dismissed the action and held the title of Harlan county good. To reverse that judgment is the object of this proceeding; and the plaintiff in error makes the following

ASSIGNMENTS OF ERROR.

1. Upon the facts as found by the court the plaintiff was entitled to a judgment; and the court erred in rendering a judgment for the defendant.

2. The court found that the judgment for damages rendered in favor of Harlan county and against Ezra S. Whit-

ney, in the criminal prosecution brought by the state of Nebraska against said Whitney for embezzlement, did not deprive said Whitney of any opportunity to defend against his civil liability, but constituted due process of law; and a sale of the property in controversy, under an execution issued upon said judgment so rendered, was valid, binding, and divested the title according to the laws of the land. In this the court erred.

3. The court erred in holding that the legal proceedings by which the defendant obtained title to the land in controversy constituted due process of law.

BRIEF AND ARGUMENT.

While there are three assignments of error, yet in effect they present a single question, viz., Did the district court of Harlan county have any power or authority to award damages against Whitney and in favor of Harlan county, in a criminal prosecution (to which the county was not a party) brought and prosecuted by the state in its own name, to convict Whitney of a crime, no pleadings being filed except the criminal information, charging Whitney with the offense of embezzlement?

In considering the question involved here, we must start with the proposition that the construction of its own statutes and constitution by the Nebraska supreme court is conclusive and binding in this proceeding. *Claibourne Co. v. Brooks*, 111 U. S. 400; *Bucher v. Cheshire Co.*, 125 U. S. 555; *Burgess v. Seligman*, 107 U. S. 20. And the Nebraska supreme court in passing on this identical judgment held that the imprisonment alone was the *punishment* for the crime, and that the judgment rendered for $22,380 was *no part of* the punishment, but was merely "compensation for the value of

the thing embezzled, and for liquidated damages." In Nebraska the syllabus in each case is prepared by the court, and is the law of that case.

Holliday v. Brown, 34 Neb. 232.

But the opinion in *Everson v. State*, 66 Neb. 154, was prepared by the court commission, and as stated at the close of the opinion, "For the reasons stated in the foregoing opinion, the judgment is affirmed." So that in this opinion both the syllabus and the opinion are the law of the case.

The proposition, then, is simply this: Is a judgment rendered under such circumstances, one obtained upon due process of law, within the meaning of the federal constitution?

The learned circuit court, in deciding the case and dismissing the action, filed a written opinion stating the reasons therefor. An examination of this opinion will discover that the learned trial court failed entirely to apprehend the meaning given to the section (124) by the Nebraska supreme court in construing its meaning in the Everson case (66 Neb. 154). The circuit court quotes (record, 9) from the opinion in 66 Neb. the following:

> "It will be seen by reading this statute that the fine is to *operate as a judgment at law* for the *use of the party* whose money has been embezzled, and this court has said in a case involving the same principle, that sec. 5 of art. 8 of the constitution was not intended to deprive the legislature of the power to pass statutes of this character, whereby a fixed sum in the nature of liquidated damages is given to one who has suffered injury by the wrongful act or oppression of a public officer."

And commenting on it the circuit court proceeds (record, 9):

"The decision of the supreme court upholding the validity of this statute, so far as it is affected by the constitution of the state, is binding upon this court. Whether or not the judgment violates the fourteenth amendment of the Constitution of the United States is a question open for the determination by the federal court.

"It is urged on the part of plaintiff that in a criminal prosecution conducted in the name of the state against Ezra S. Whitney, a judgment rendered for the benefit of Harlan county, a third party, is one rendered without due process of law. I do not think so. The legislature had undoubtedly the right to prescribe the *penalty* which should be imposed upon a public officer for the crime of embezzlement, and the statute provided that such penalty should be imprisonment and a fine for the benefit of the injured party in double the sum embezzled."

But that opinion of the trial court *refused* to recognize or follow the construction given to the statute by the supreme court of Nebraska, which it declared in its opinion to be binding on it. The Nebraska supreme court declared that the amount awarded was *not* a "fine," but a judgment; that it was *not* a part of the *punishment*, but was *compensation* for the *injury* and in the nature of liquidated damages. Yet the circuit court in *its* opinion proceeds to declare that it *was* a part of the *punishment*, and that the legislature had the right to impose the fine, when the Nebraska supreme court had held that it was *no* part of the punishment, but was a *judgment for damages* (66 Neb. 158). Again, in its opinion the circuit court says (record, 9):

"The issue then presented at the trial in the criminal case was: First, was the defendant guilty of the crime of embezzlement; and, second, what was the amount embezzled? Of this the defendant had due notice, had an opportunity to be heard upon both propositions. The jury in due course said he was guilty of embezzlement and fixed the amount thereof. The law then said what the

> punishment should be, and whether it be denominated a fine for the benefit of the school fund or a judgment for the benefit of the party whose property had been embezzled, it seems to me can make *no difference* in determining whether there was due process of law."

If, as stated in that opinion of the circuit court, the defendant Whitney "had an opportunity to be heard upon both these propositions," that is, an opportunity to make defense to them, then there might be force in holding that even in a criminal proceeding a civil judgment might be rendered, and there would be due process of law. But the learned circuit court failed to grasp the distinction between rendering a judgment in a criminal proceeding as a part of the punishment, and rendering a judgment in the criminal case without pleadings, without issues, and without opportunity to plead and establish defenses to a recovery, merely for damages. If the award of $22,380 were a *fine*, then we admit it would be due process of law, for it would be a part of the punishment. But if it is a *judgment* for damages, and is no part of the punishment, then it is utterly void and is not due process of law, for no opportunity whatever to defend against the civil liability was given Whitney in that proceeding.

In the case at bar, the defendant Whitney, at the time the verdict of guilty was rendered, did not owe the county of Harlan a penny. For what, then, was the judgment of $22,380 rendered? The supreme court of Nebraska, in Everson v. State, 66 Neb. 154, held that it was for damages by reason of the taking and embezzling the county's money. But in order to secure a judgment, there should be some sort of liability AT THE TIME. Had the defendant Whitney been given an opportunity to do so, he would have proved, not only that he did not owe the county a dollar, but that he held their receipt *in full discharge* of *all liability* on account of his shortage as

treasurer. In a claim or demand brought to enforce a civil liability against him in favor of the county, this receipt and settlement would have been a complete bar to recovery. He had already settled with Harlan county *its damages* and canceled *that* liability. Is it possible that, with such a receipt in his possession, and under such facts, Whitney must not only pay to the county again the claim from which the settlement and receipt discharges him, but he must pay it twice over? This he *must* do if his liability is made to depend on the verdict alone, regardless of whether he had settled and liquidated his civil liability to the county; his obligation to respond in damages did not depend, therefore, upon any liability, but upon the verdict on the issue of guilty or not guilty. Nor would it make any difference if he had had no defense. He must be given his *opportunity* to present it. The supreme court of New York has well expressed the proposition as follows:

"The constitutional validity of a law is to be tested, not by what *has* been done under it, but by what *may, under its authority be done.*"

Stuart v. Palmer, 83 N. Y. 183, 188.

Nor is it due process that Whitney was in court at the time the judgment was entered, and so had knowledge or was bound to know that it was entered. Nor is the fact that one has notice by chance sufficient.

"The law must *require* notice to them, and give them the right to a hearing and an *opportunity* to be heard. . . The legislature may prescribe the *kind* of notice and the mode in which it shall be *given, but it can not dispense with all notice.*"

Stuart v. Palmer, supra.

There was no opportunity given here to defend. In a criminal prosecution the fact that he has paid the money back which he embezzled is no defense to the crime. And any attempt to show such settlement would be immaterial and improper and be rejected. There was, therefore, no opportunity in the criminal case prosecuted by the state in *its* name to make this defense to the civil liability in favor of Harlan county. It is the denial of *this right to defend* against a purely civil liability, in favor of the county, upon which the judgment for compensation and damages rests, that we assert constitutes a denial of due process of law.

These propositions were disposed of by the circuit court as follows (record, 10):

> "The answer to this is that it is within the power of the state to say what the *punishment* for embezzlement by a public officer shall be. The legislature has prescribed that, in *addition* to *imprisonment*, a *fine* shall be imposed for the benefit of the party whose property was embezzled."

The whole difficulty with the circuit court lies in the fact that the judgment for $22,380 is treated as part of the punishment, when in fact the supreme court of Nebraska says it is *not*, but is a judgment.

Suppose sec. 124 were printed in the statute as construed by the Nebraska supreme court. It would then read something as follows:

> "Such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and this shall *constitute the entire punishment for said crime;* but at the same term of court, and immediately on the coming in of the verdict of guilty, the judge may, and it is hereby made his duty to render

> a judgment against the convicted party, in double the amount found by the jury to have been embezzled, in favor of any and every party whose money has been embezzled. And it shall be no defense whatever to such judgment that the convicted party may have made full restitution to said person from whom the money was embezzled, as no opportunity will be afforded to plead or establish any defense. And said judgments shall operate as a lien on all of the estate of the convicted party and shall only be satisfied and discharged of record by the party for whose benefit it was entered; and such person may have an execution to enforce collection of the same."

Would any court anywhere hold a judgment entered under such a statute good and sufficient and within the guaranty of the federal constitution which provides for the taking of property only upon due process of law? We apprehend not. And yet that is precisely what the statute comes to under the construction given it by the supreme court of Nebraska in the Everson case (66 Neb. 154). In order to affirm that conviction, the supreme court of Nebraska was forced to adopt the construction which it did. To have held that the word "fine" meant what it says; to declare it to be a fine in fact and law would have avoided the award under the state constitution above quoted. For if the word "fine" is to be given its ordinary meaning as used in that section (124), so much of the section as authorized the "fine" was repealed by the constitution of 1875. By judicial construction this award of $22,380 is a judgment for damages, nothing more nor less. That Whitney had no opportunity of establishing his payment and discharge from his civil liability, for which the judgment was entered, is apparent. Will the law sanction such an outrage and call it due process?

A recent North Carolina decision illustrates the principle for which we contend.

Re Emmett Boyett, 136 N. C. 415.

In that case an application for a writ of habeas corpus was made on the following state of facts:

The petitioner was indicted for the murder of his wife and entered a plea of not guilty. The plea of his counsel was insanity. The jury returned a verdict of not guilty, and he was acquitted. Thereupon, the presiding trial judge, without any notice to said defendant, and without the filing of any complaint or pleading, or taking any evidence of any facts as to the mental condition of said prisoner, entered an order committing said defendant to the "hospital for the dangerous insane, to be kept in custody therein as provided by" certain acts of the legislature of that state.

The section of the act under which authority was claimed to commit him provided,

> "That when any person accused of the crime of murder . . . shall have escaped indictment, or shall have been acquitted upon the trial, upon the ground of insanity . . . the court, before which such proceedings are had, shall, in its discretion, commit such person to the hospital for the dangerous insane, to be kept in custody therein for treatment and care," etc.

The application for the writ of habeas corpus was directed to the keeper of the "hospital for the dangerous insane" and was based upon the unconstitutionality of the statute above quoted, because no provision was made for giving the person acquitted either *notice*, or an opportunity to be heard, or requiring the question of his insanity *at that time* to be inquired into; it being admitted that the state, in the exercise of its general police power, had authority to provide for the involuntary confinement of insane persons, not only for their

own care and protection, but for the protection of others as well. But the objection was to the *manner* of proceeding; it being contended in the very nature of things, that under the *constitution* no commitment could be made except *after judicial inquiry*, in which the accused *must* be notified and given an *opportunity* to appear and defend. The court, after referring to many adjudicated cases, says:

> "It is not necessary to discuss the question what is 'due process of law' or to adopt any of the various definitions thereof. There is here, in no possible aspect, anything approaching the requirements of due process of law."

The reasoning in that case is by analogy, it seems to us, decisive of the case at bar. What opportunity had Whitney in the criminal trial to show that at *that* time he did not owe the county anything? The verdict found that he had embezzled $11,190 as stated in the information, but the information charged this to have occurred in 1896. The county of Harlan was not in that case asking anything from Whitney; nor could it have intervened to prove its debt. It had a separate suit pending in that court for that purpose (record, 12). There was no finding in the verdict of the jury as to what, if anything, Whitney owed the county of Harlan at the time of its rendition. Had Whitney been given an opportunity he would have established that, at *that time*, he had settled in full with the county. And yet a judgment for $22,380 is rendered for "*compensation*" for taking $11,190, which had been returned and the county satisfied, before the conviction was established. Whitney was denied all opportunity to prove his defense to the claim of Harlan county. The proceeding by which this so-called judgment was obtained was what Mr. Justice Story characterized "a solemn fraud." The court had no jurisdiction whatever to render the judgment.

Jurisdiction is the right to hear and determine, not the right to determine without a hearing.

Windsor v. McVeigh, 93 U. S. 274 (L. Ed. 23, 914).
Hovey v. Elliot, 167 U. S. 409 (L. Ed. 42, 215).
Gaplin v. Page, 85 U. S. 350 (L. Ed. 21, 959).
Ex Parte Wall, 107 U. S. 289 (L. Ed. 27, 562).

In *Gaplin v. Page, supra*, it is said:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear and *has been afforded an opportunity to be heard.* Judgment without such *citation* and *opportunity* wants all the attributes of a judicial determination; it is judicial usurpation, and can never be upheld where justice is justly administered."

In *Windsor v. McVeigh, supra*, it is said:

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Whenever one is assailed in his person, or his property, *there he may defend, for the liability and the right are inseparable.* This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard, is *not a judicial determination of his rights*, and is not entitled to *respect in any other tribunal.*"

And again in the same opinion it is said:

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, can not be collaterally assailed, is undoubtedly correct as a general proposition, but like all

general propositions is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil and criminal; or to particular modes of administering relief, such as legal or equitable; . . . though a court may possess jurisdiction of the cause and the subject-matter and the parties, it is still limited in modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and can not then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the parties and subject, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court can not order, in the case, the specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgment given, in the cases supposed, would not be merely erroneous; they would be *absolutely void* because the court in rendering them would transcend the limits of its authority in those cases. . . . And the reason is that the courts are not authorized to exert their power in that way. The doctrine stated by counsel is only correct where the court proceeds, after acquiring jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

To say that the courts have an inherent right to render a civil judgment in a criminal proceeding, where the only issue is the guilt or innocence of the accused, is to declare that a court is possessed of the right to enter judgment without pleadings or issue, and deny all defenses on such civil liability, and that a court has full power in such criminal case to redress the damages (suffered by the criminal act)—without

trial, pleadings, issues, or hearing. The civil judgment in such a proceeding is made, therefore, to depend, not upon any legal liability, but upon the *result* of the criminal case; in the very nature of things such a holding would, under the authorities above cited, convert the court exercising such an authority into an instrument of oppression and injustice, and hence strip it of that very attribute of justice upon which the exercise of judicial power depends, viz., deliberation *after hearing.*

In the Dartmouth College Cases, 17 U. S. (4 L. Ed. 4), 629, Mr. Webster defines due process of law as follows (p. 581):

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon *inquiry* and renders judgment *only after trial.* The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

This definition is quoted with approval by the U. S. Supreme Court in *Ex Parte Wall, supra.*

In *Hovey v. Elliott, supra,* the court says (p. 417):

"Can it be doubted that due process of law signifies the right to be heard in one's defense? If the *legislative department* of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and foundation of justice itself, has yet the authority to render lawful that which, done under express legislative sanction, would be violative of the constitution?"

In *Underwood v. McVeigh,* 23 Grattan, 409, the supreme court of Virginia held that the refusal to permit a defendant

to be heard rendered the judgment absolutely void. The court says:

> "It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the *opportunity of being heard in defense*, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defense."

The doctrine of all these cases may be said to be that the judgment was void because no opportunity was given to defend. And it makes no difference in its legal effect how that result is brought about. It is the result—the denial of an opportunity to defend—that avoids the judgment. If the action of a court in refusing a defendant permission to answer and opportunity to defend is a denial "of due process of law," then clearly a legislative enactment which by its terms denies to a defendant such privilege and opportunity of defense must, when enforced by the order of a court, likewise constitute a denial of "due process of law."

Mr. Justice White, speaking for this court, in the opinion in

Simon v. Craft, 182 U. S. 427,

says (page 436):

> "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things, and not by mere form."

In the judgment complained of in the case at bar both these "essential elements of due process of law" are wanting.

In all personal actions a *personal notice* and *opportunity to defend* must be afforded; and if either is withheld the court is without power and its judgment void as in contravention of due process of law. The seeming exceptions, however, to this rule, found outside of judicial tribunals, are still in strict accordance with "the law of the land."

In *Den v. Hoboken Land and Imp. Co.* 59 U. S. (18 How.), 272, the facts were, the collector of the port of New York was short in his accounts to the government upward of a million and a half of dollars; the act of 1820 provided for the issuing of a distress warrant, in such cases, and that it should be a lien on the lands of the debtor from the time of the levy and record thereof in the office of the district court of the United States for the proper district. A warrant was issued against the collector and his land sold thereunder to the plaintiffs. Subsequently, upon a judgment duly rendered against the collector, the same land was levied on and sold to the defendant. The suit was ejectment; the defendants claiming that the summary method of levy and sale under the distress warrant was a denial of due process of law. The court held otherwise, and after reviewing authorities and practices in England before the adoption of our constitution, declared that in regard to the King's revenue such summary methods were indulged, and that the act of 1820 and the procedure under it were "according to the law of the land," and consequently the title under the distress warrant was valid.

In *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388 (L. Ed. 447), the facts were, the jib boom of a schooner struck against the defendant's building on the bank of the Chicago river, making a breach in its walls, whereby a quantity of grain ran out and was lost. By attachment issuing out of the state court the boat was taken and a redelivery bond given by the owner of the tug, and one Christy, as surety, conditioned to pay any judgment rendered by the court in said cause. Subsequently the damages were ascertained and a judgment rendered against both principal *and surety*, in accordance with the practice of the state of Illinois and the construction given by it to its statutes. It was argued that the judgment against Christy was in violation of the due process clause of the constitution, he having had no notice in the case in which judgment was entered. This court held that the view of the Illinois court was right, viz., that by signing the bond Christy "virtually consented that judgment might go against him" under the statute, "if the plaintiff should be entitled to judgment against Johnson" and the validity of the judgment (it being according to the Illinois practice) was affirmed.

In *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230 (L. Ed. 747) the facts were these: the railroad company was not made a formal party defendant by name, but was in possession of the physical property mortgaged by its assignor, receiving the income therefrom. It filed the answer for and conducted the defense in the name of its assignor, and the issues were hotly contested by it. After judgment rendered against the mortgagor company, a rule was entered against the Louisville & N. R. Co. to show cause why it should not pay the judgment, it having possession of the physical property and income of the mortgagor company (its assignor),

and said assignor being without means of payment. Unde
said rule it returned that it had not been made a party to th
judgment, claiming also to have an additional defense b
way of setoff, whereupon the lower court discharged the rul
The court of appeals of Kentucky reversed this holding an
ordered the judgment entered. By writ of error the caus
came to this court for review, upon the contention that th
judgment so entered was without due process of law, an
that it had been denied an opportunity to be heard in the de
fense of its setoff. This court, in affirming that case, say
(page 239) that its action in appearing for the assignor an
conducting the defense gave it its day in court; continuing
the court says (page 239):

"The argument therefore asks us to say that the Louisville &
Nashville in the proceeding *in which it was duly served
and to which it responded*, and as to which it *had its
day in court*, was deprived of defenses which it never as
serted, and that due process of law was not administered
to it because it was unheard in respect to matters con
cerning which it made no claim. . . . True it is that
in *Rees v. Watertown*, 19 Wall. 107, it was said:
'*Whether in fact the individual has a defense to the debt,
or by way of exemption, or is without defense, is not im
portant.* To assume that he has none, and that therefore
he is entitled to no day in court, is to assume against
him the very point he may wish to contest.' But this
truism was stated with reference to a case where it was
argued that a condemnation without notice could be jus
tified on the assumption that if notice had been given, no
defense could have been made."

The court's differentiation of the case in the 19 Wall is the
precise distinction in the case at bar; and the rule of that
case (*Rees v. Watertown*) is altogether applicable to and
decisive of the instant contention.

In *Davidson v. Board of Admins.*, 96 U. S. 97 (L. Ed. 616), the facts were, the board of administration of the city of New Orleans created a drainage district to remove by ditches and canals the waters from a large tract of swampy land, the cost of such removal to be assessed against the property benefited. Opportunity to file in court objections to the assessment was provided by law, of which provisions the plaintiff availed herself. Judgment having been awarded against the property by the supreme court of Louisiana, writ of error was sued out to this court on the ground that the proceeding was wanting in due process of law. It was held, in affirming the judgment, that it was not necessary, in order to constitute due process of law, that the right asserted against the individual or the burden imposed upon his property for public use should in all cases be done by resort to a court of justice; and that, where a burden was imposed upon property which required the act of a court to render it final, or permitted the parties an opportunity to present their objection in court, it *was* due process within the constitution. Such cases, although no notice was actually served, would, we concede, be due process of law and yet have no application to the case at bar.

To the same effect is *Fallbrook Irr. Dis. v. Bradley*, 164 U. S. 112 (L. Ed. 369).

In *Cincinnati &c. R. R. v. Kentucky*, 115 U. S. 321 (L. Ed. 416), the facts were, the board of railroad commissioners made the assessment against the railroads of the state upon data and schedules furnished by the companies. The act pro-

vided that upon the failure to pay the taxes so levied the state should bring suit in one of its counties. Suit having been brought, the companies defended on the ground that the assessment having been made without notice was a taking of their property in violation of the due process clause of the constitution. This court, however, held otherwise, inasmuch as full opportunity to defend was given in the suit to enforce collection of the taxes.

In

Wilson v. Standefer, 184 U. S. 399 (L. Ed. 612),

a suit was instituted in the state court to recover forfeited school lands under contract of purchase from the state of Texas. The law permitted the state to forfeit upon default in payment, but provided that suit might be instituted at any time within six months thereafter to reinstate upon a showing that there was in fact no default. This court held that a forfeiture under such act did not deprive the purchaser of his property without due process of law, as the law provided an opportunity to appear in court and set aside the forfeiture if invalid or improperly entered.

In

Wilson v. The State of No. Car. ex rel., 169 U. S. 586 (L. Ed. 865),

the question was whether the suspension of a railroad commissioner from office, by the governor, under the law of North Carolina (which by its terms provided that such suspension

was to be reported by the governor to the next legislature, when, if he was not removed by its action, he was to be considered reinstated) was a deprivation of his rights without due process of law, and this court held that the controversy related solely to a state office, and that the right thereto must be measured by the statutes and constitution of the state.

In

Hodge v. Muscatine County, 196 U. S. 276 (L. Ed. 477),

the question was as to the validity of the Iowa cigarette law, which made the annual charge imposed by the Iowa code upon cigarette dealers a lien "upon the real property and the owner thereof" wherein cigarettes are sold. The law provided that the owner might apply to the board of supervisors to remit the tax, and in case of a denial of such petition, a right of appeal was given to the district court. And this court held that such provision for appeal constituted due process of law.

In

Lowe v. Kansas, 163 U. S. 81 (L. Ed. 78),

the statute of Kansas provided that in a criminal prosecution for libel the complaining witness should be liable for costs whenever it should be made to appear that the prosecution was malicious and without probable cause, and judgment

should be rendered against him for that amount upon the finding of the jury. Lowe was adjudged to pay costs under said act, which judgment was affirmed by the supreme court of Kansas, whereupon Lowe sued out a writ of error to this court, challenging the validity of such judgment on the ground of want of due process of law. This court affirmed the judgment of the supreme court of Kansas on the ground that, long before the separation of the colonies from the mother country, costs were granted against informers under the penal statutes, and that inasmuch as Lowe was an actor in the libel suit with power to direct its conduct and *opportunity to offer evidence and be heard upon the issues*, the judgment for costs was not a denial of due process of law.

In none of these cases was there any denial of the right to be heard in defense. In the case at bar the opportunity to defend was lacking. Suppose on a criminal trial Whitney had been permitted to prove a repayment of the money embezzled and full settlement of the county's claim; suppose the jury had found the amount of the embezzlement to be $11,190, and that Whitney had, subsequent to said embezzlement, paid the county in full; would it not be the duty of the court under the statute to enter a judgment for double the amount embezzled? Is not this the exact command of the statute? But in the criminal case such proof would be *immaterial and improper*. In a civil case it would *defeat recovery*. Why, then, should he be bound to offer it in a criminal case when such evidence was not within the issues? Why should he be compelled to offer proof in defense of a civil liability when there was no issue in the case charging him with such liability? The interpretation of its statute and constitution by the supreme court of Nebraska is bind-

ing on this court. The judgment under which the county claims title to the land in controversy is a civil judgment, based on a civil liability, according to that interpretation. The only question for this court to decide is whether a judgment, based upon a civil liability, can be entered against a defendant in a criminal case, in favor of a stranger to the record, without any claim made by said stranger, without any petition or even request for judgment on his claim, without notice to said defendant, and without opportunity for him to defend?

An unconstitutional statute affords protection to no one who has acted under it. And the judgment rendered in accordance with its mandate is a nullity everywhere.

Simonds v. Simonds, 103 Mass. 572.
Campbell v. Sherman, 35 Wis. 103.
Monore v. Collins, 17 Oh. St. 665.
Astrom v. Hammond, 3 McLean, 107 Fed. Cases, No. 596.
Woolsey v. Dodge, 6 Id. 142, Fed. Cases, No. 18032.

A judgment rendered by the court upon a matter not within the pleadings nor tendered by the issues of the case must be treated as a nullity.

Reynolds v. Stockton, 43 N. J. Eq. 211.
Reynolds v. Stockton, 140 U. S. 254; L. Ed., 35, 464.
Munday v. Vail, 34 N. J. L. 418.
Unfried v. Heberer, 63 Ind. 67.
Smith v. Ontario, 18 Blatchf. 454.

In the case of *Reynolds v. Stockton*, 140 U. S. *supra*, Mr. Justice Brewer, after quoting from the opinion of the supreme court of New Jersey in *Munday v. Vail*, says:

"That in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be *responsive to the issues tendered by the pleadings*. In other words, that when a complaint tenders one cause of action, and in that suit service on or appearance of the defendant is made, a subsequent judgment rendered therein, in the absence of the defendant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state, and, of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another state."

The judgment of a court acting without authority is a nullity.

Hogan v. Wahrenberger, 9 Tex. 313 (58 Am. Dec. 145).

Seamster et al. v. Blackstock, 83 Va. 232.

Dunlap v. Southerlin, 63 Tex. 38.

II.

In the hearing at the circuit defendant cited a large number of cases to the effect that the state has power to punish a criminal offense by both fine and imprisonment, and that

a fine could be collected by the levy of an execution upon the property of the convicted person and sale thereunder, and that such a judgment imposing the fine as a part of the punishment was due process of law.

With these authorities we do not differ. But the difficulty with defendant's citation is that they do not present the question which we raise. The question is not the power of a state to inflict both fine and imprisonment for an offense; nor yet the right to collect a fine by execution. The proposition, as already stated, is, has the court the power, the jurisdiction, in a criminal case, to render a judgment in compensation for the civil injury in favor of the one injured, when he is not a party to the suit, and when there is no pleading, claim, or demand by such party for such compensation, and where the only issue in the case is the guilt or innocence of the accused?

III.

But another point made at the hearing before the circuit court was that the decision in the case of *Everson v. State* (66 Neb. 154) was in effect an adjudication of the title and therefore binding as *res judicata*. Such is not the law.

A judgment in a criminal case is not a bar in a civil case and can not be pleaded as an estoppel.

U. S. v. Schneider, 35 Fed. Rep. 107.
Coffey v. U. S., 116 U. S. 436 (L. Ed. 29-684).
Betts v. New Hartford, 25 Conn. 180.
Clark v. Irwin, 9 Ohio, 131.
Mead v. Boston, 3 Cush. 404.
Corbley v. Wilson, 71 Ill. 209.
Ches. & O. Ry. v. Dyer County (Tenn.), 11 S. W. Rep. 943, 945.
Hutchinson v. The Bank, Etc., 41 Pa. St. 42.

Wharton, Evidence, sec. 777.
Potter v. Baker, 19 N. H. 166.

In *Wharton on Evidence*, sec. 777, it is said:

"The reasons why a judgment in a civil case should bind all subsequent proceedings between the same parties on the same cause of action do not apply, so it is generally argued, when a criminal judgment is sought to be afterwards used in civil litigation. In the first place, while the parties to a civil suit by appearing accept the arbitrament of the court, and thereby enter into obligation to be bound thereby, in a criminal prosecution the defendant is regarded as attending by compulsion, and as entering into no such obligation. In the second place, the parties to a civil suit can not be identical with those of a criminal suit, for in a criminal suit it is the sovereign who, nominally at least, prosecutes. Hence, in the Roman law as well as in our own, a prior criminal judgment is not conclusive as to a subsequent civil suit for the same subject matter."

In *Betts v. New Hartford*, 25 Conn. 180, the facts were that one Chapin was the owner of a tract of land and had sold lots adjoining the continuation of a highway, and had platted the highway and named it, but had not dedicated it. He told the parties to whom he sold that the town would purchase it ultimately and make it a public highway. Chapin placed obstructions upon the portion platted as a street, and was arrested for obstructing a public highway and fined four dollars. He appealed to the county court, where he was tried, convicted, and fined ten dollars. He sued out an error proceeding, but the superior court refused to disturb the fine. Proceedings were subsequently instituted to lay out the road in the place where it was platted by Chapin, and Chapin demanded damages for the taking. The record of his conviction in obstructing the public highway was offered to show that the matter was adjudicated against him and that he was

estopped to assert claim to the land. Speaking upon this point, th supreme court says (p. 184):

"A verdict in a criminal case is not evidence of the facts upon which judgment was rendered, when those facts come up in a civil case, for this evidence would not be material; and so the law is perfectly well settled."

In *United States v. Schneider*, 35 Fed. Rep. 107, the suit was brought to recover of the defendant certain tax due as a wholesaler of malt liquors. Previous to the bringing of the civil suit to recover the tax a criminal prosecution had been begun against the defendant by the United States, charging him with being a wholesaler of malt liquors, and with having as such dealer violated the law. In this prosecution he was acquitted, and this acquittal was pleaded as an estoppel against the civil suit. The court in disposing of the matter said (p. 108):

"The two actions arise out of exactly the same circumstances. It is material to allege and prove in either case that the defendant was a wholesale dealer in malt liquors. And the question now is, Can the finding of the fact in the criminal action that the defendant was not such dealer be pleaded as an estoppel in this civil action?

"As a general rule this can not be done, for the reason that the parties to the two actions are seldom the same; the criminal one being prosecuted by and in the name of the state, and the civil one by the party injured by the act or conduct constituting the crime. 1 Greenl. Ev., sec. 537; I What. Ev., sec. 776. But it so happens that the parties are the same in both these actions.

"Another reason given against the estoppel in such cases is that the rules of decision and the course of proceedings are not the same in the two actions, and therefore different results may properly be reached in the trial of them. 1 Greenl. Ev., sec. 537; 1 What. Ev., sec. 776.

" . . . The only material difference in this court is that in the former case the verdict must be for the defendant unless the evidence established his guilt beyond a reasonable doubt, while in the latter it is given for or against him, according to the preponderance of the evidence.

"This, in theory at least, is a material difference, and it may be that the same jury, on the same evidence, acting on this rule would find the defendant was a dealer in malt liquors, as alleged in the civil action, and refuse to do so in a criminal one. Therefore the United States is not estopped by the verdict in the criminal action, to allege and prove in this one that the defendant was a wholesale dealer in malt liquors."

The case of *Coffey v. United States*, 116 U. S. 436, seems to hold that where parties are the same identically there is an estoppel. But that case is not necessarily at variance with the one above, as a careful reading will discover. In that case, however, the court states the general rule as follows:

"When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that certain intent must be proved to support the indictment, which need not be proved to support the civil action. But in this record, as we have already seen, the parties and the matter in issue are the same."

In *Clark v. Irwin*, 9 Ohio, it is said that:

"Neither the plea of guilty in a criminal prosecution, nor the judgment founded upon it are conclusive against the defendant in a civil suit."

And that

"Such plea stands like any other confession of a party, and may be controverted."

In *Mead v. Boston*, 3 Cush., it is said by the court (p. 407):

"We are strongly inclined to the opinion, that in no case is the conviction in a criminal case conclusive, because it may have been obtained upon the testimony of the plaintiff, or other persons interested. It is not the fact, that the verdict was or was not obtained upon the testimony of the plaintiff, or of some other party interested, that renders the conviction incompetent evidence, but it is rejected because it is *res inter alios*. And one reason why any person can be received as a witness in a criminal case is that the conviction or acquittal can not be used elsewhere, and between other parties. The admission in a civil action of a conviction upon an indictment, founded on a plea of guilty, is no exception to this rule. That is received, not as a judicial act, having the force and effect of a judgment, but as a solemn confession of the very matter charged in the civil action."

The learned circuit court, under the authorities, very properly held that said judgment was not *res judicata*.

The single question in the case is one of power in the district court of Nebraska to render a civil judgment in a criminal case, under the law of Nebraska as construed by its supreme court.

We think such pretended judgment void as lacking in due process, and all proceedings under it void. If this court so holds, the plaintiff's title is good, and he is entitled to recover.

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